Supreme Court, U.S.
FILED

No. 00- 00-248 AUG 14 2000

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IN THE

Supreme Court of the United States

WESTLEY WEST, *et al.*,

Petitioners,

v.

NICK A. CONGEMI, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a constitutional "Hatch Act" or "Little Hatch Act" be enforced, without violating the First Amendment's rights of free speech and association, by the termination of covered civil service employees who, acting in their official capacities as representatives of a public employee association, communicate to a candidate for office the association's endorsement and support for that candidate?

PARTIES TO THE PROCEEDING BELOW

The Plaintiffs in the District Court include Westly West, Dennis Lynch, Robert Polito, Henry Jaume, Bruce Verrette and Police Association City of Kenner, I.U.P.A., AFL-CIO, Local 8195. All Plaintiffs were Appellants before the United States Court of Appeals for the Fifth Circuit. They are Petitioners here. The Defendants, Appellees, and Respondents included Nick A. Congemi, Chief of Police, City of Kenner, Louisiana (in his official capacity) and the City of Kenner, Louisiana.

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PETITION FOR WRIT OF CERTIORARI

Westly West, Dennis Lynch, Robert Polito, Henry Jaume, Bruce Verrette and Police Association City of Kenner, I.U.P.A., AFL-CIO, Local 8195, Plaintiffs in the District Court and the Appellants in the Court of Appeals, hereby petition for writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Westly West, et al. v. Congemi*, et al., Fifth Circuit No. 99-30258 (March 21, 2000).

OPINIONS BELOW

The Court of Appeals opinion is unpublished and is reproduced as Appendix A to this *certiorari* petition (hereafter "Pet. App."). (Pet. App. 1a).

The District Court's opinion on Summary Judgment was issued on November 23, 1998 and is reproduced as Appendix F. (Pet. App. 17a). The District Court's final order is unreported and is reproduced as Appendix G . (Pet. App. 38a).

JURISDICTIONAL STATEMENT

The Court of Appeal's Opinion and Judgment were entered on March 21, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). A Petition for a hearing *en banc* in the Court of Appeals for the Fifth Circuit was denied on May 15, 2000. (Pet. App. 40a).

STATUTES AND REGULATIONS INVOLVED

This case involves the construction of Louisiana Revised Statute § 33:2504. The statute is reproduced as Appendix I. (Pet. App. 42a). See also City of Kenner Rules on Political Activities and warning to classified Appendix K, (Pet.App. 61a)

STATEMENT OF THE CASE

The Police Association, City of Kenner, Local 8195, International Union of Police Associations, AFL-CIO (hereafter "PACK") is an association, or union, representing the working interests of Kenner's police officers. In 1998, the five individual petitioners in this case were Police Officers of the City of Kenner, Louisiana. Petitioners served as the Executive Board of PACK. They were covered by Louisiana's "Little Hatch Act". Petitioners Nick Congemi was the Kenner Police Chief.

Petitioners, PACK's President (West), Vice-President (Lynch), Secretary (Polito), Treasurer (Jaume), and Sergeant at Arms (Verrette), were required by the PACK Constitution and Bylaws to carry out official duties on behalf of PACK.

Since very early in 1998, Police Chief Congemi was politically opposed to PACK and its agenda. His antagonism arose from the opposition of PACK, its officers, and representatives of other Louisiana labor organizations to his efforts in the state legislature. He specifically urged his staff to encourage members of PACK to quit. He announced that he intended to "get rid of PACK because they were in his way." He repeatedly expressed antipathy to PACK and vowed at staff meetings that he would do PACK injury.

Kenner Retire Lieutenant Trippi, Aff. Op. Rec. Ex. #3. (Pet. App. 51a, 52b and 54a)

On February 23, 1998, Joseph Stagni, a candidate for councilman in Kenner, wrote to PACK requesting an endorsement. (Pet. App. 46a, 51a, 69a). On March 3, 1998, PACK polled its membership concerning the endorsement or opposition to it. (Pet. App. 46a, 51a,71a). On March 10, 1998, Chief Congemi wrote to all PACK members questioning PACK's procedures, requesting that PACK members interview a competing candidate whom Congemi endorsed as "a true friend of every police officer," and asking PACK members write to PACK. (Pet. App. 51a, 52a, 73a). PACK requested and received legal advice which indicated that PACK, as an association or union, was allowed to make political endorsements. On March 13, petitioners, acting as the Executive Board of PACK authorized a $300 contribution to Stagni. (Pet. App. 47a, 53a, 76a). On March 14, PACK provided the candidate with a formal letter of endorsement. (Pet. App. 47a, 53a, 79a). On March 30, 1998, PACK made a $300 contribution to Stagni. (Pet. App. 47a, 80a).

None of the officers ever endorsed candidate Stagni personally, nor individually; none spoke or wrote on behalf of his candidacy. No public statements on behalf of Stagni were made by the officers. No public announcement of PACK Local 8195's endorsement of Stagni was made by the union or its officers. (Pet. App. 49a, 52a and 53a) Candidate Stagni, on his own initiative listed PACK, along with other organizations, including the Kenner Firefighters, the Alliance of Good Government, the Teachers Union, and the AFL-CIO, as supporting him during April 1998. (Pet. App. 53a, 81a). No executive board member or other police officer was named. At no time was any public pronouncement or annunciation made that any of the five petitioner police

officers or any other individual police officers endorsed Stagni. (Pet. App. 49a, 52a, 53a)

On May 4, 1998, Congemi ordered an internal affairs investigation of PACK's officers. On May 7, recorded statements were taken from the officers who confirmed that PACK had endorsed and contributed to a political candidate. On June 1, 1998, Chief Congemi served a pre-termination notice on them. (Pet. App. 47a).

On June 2, 1998, the officers filed a petition in the Twenty-fourth Judicial District Court, for the Parish of Jefferson, seeking protection from discipline arising out of the PACK endorsement. The five officers sought injunctive relief enjoining and prohibiting respondent, Police Chief Congemi, from further harassment of them because of their association with PACK, from further improper investigation of PACK, and from further action against them as a result of the endorsement of a candidate by PACK. On June 4, 1998, the Chief and the City filed a notice of removal to have the case removed to federal court on the basis that it raised a federal question. The officers sought a TRO, which the Court denied as premature, without prejudice.

On Monday, June 15, 1998, Congemi fired PACK's executive officers. Respondents on that same day filed an answer to the petition which was now before the federal court. On June 16, 1999, the court denied the motion for a TRO on the finding that the terminated police officers were not injured irreparably in that they could be remedied by reinstatement with back pay and damages.

On October 6, 1998, PACK sought to intervene to assert its rights in the matter and filed an intervenor complaint. PACK sought a declaration that the respondent

had violated the First and Fourteenth Amendment rights of PACK, Local 8195; an injunction to prevent the respondent from taking discipline or threatening to discipline or take any further employment action, which would impair or chill PACK's First Amendment rights, against any employee of the Kenner Police Department for their association or involvement with PACK; an award of compensatory damages; reinstatement of the Executive Board of PACK; reasonable attorneys' fees and costs; and such other relief as is just and appropriate. The complaint and memorandum in support of it made clear that equitable protection from violations of First and Fourteenth Amendment violation was at the center of the dispute.

On November 23, 1999, Judge Porteous granted the respondents' motion for summary judgment, dismissed with prejudice all federal issues and remanded the remaining state claims back to Louisiana state court. (Pet. App. 17a).

Judge Porteous ruled that Chief Congemi's termination of PACK's officers was legal and a constitutionally permissible act. "The endorsement and subsequent monetary contribution to candidate Stagni by PACK, an association (or union) of Kenner police officers, which was controlled by five plaintiffs in this case, amounted to at least indirect political activity as referenced in the Louisiana statute." He therefore ruled that the doctrine of qualified immunity protected Chief Congemi from "individual official liability" on the basis of a finding that Chief Congemi "did properly comply with the statute [§ 2504]"; that Congemi was entitled to qualified immunity on the basis of a "clearly established" rule; that, therefore, no §1983 claims were available and all federal claims were rejected. He found further that under the Monell doctrine "once it was found that

the actions of the plaintiff fell under [§2503], plaintiffs' §1983 claims against the City necessarily fails." (Pet. App. 17a).

The Court then denied PACK's request for intervention as moot based on its grant of summary judgment as to the underlying case. (Pet. App. 15a)

On December 21, 1999, PACK and the officers filed a notice of appeal. On January 8, 1999, this Court remanded the case to reconsider its references to the City of Kenner as a defendant. On February 23, 1999, the district court again entered judgment for the defendant, including the City of Kenner, as the true defendants represented in the initial state action by Chief Congemi in his official capacity. (Pet. App. 13a) On March 9, 1999, PACK and the officers again noticed their appeal.

On March 21, 2000, in an unpublished opinion, the Fifth Circuit affirmed the judgment of the district court in granting summary judgment for the respondents. (Pet. App.40a). The Fifth Circuit faced squarely the issue of, "whether the concededly constitutional 'Little Hatch Act' of Louisiana, La.R.S. 33:2504, may be enforced against public officers who, acting as representatives of a police officers' association with Kenner, communicated the endorsement of and support for a political candidate" by termination of the five police officer board of the associations. The Court found that such termination was a constitutionally permissible enforcement of a Hatch Act's ban on "indirect political" activity. A petition for a hearing *en banc* was rejected.

REASONS FOR GRANTING THE PETITION

I. A CONFLICT EXISTS AMONG THE COURTS OF APPEALS AS TO THE ENFORCEMENT OF "HATCH ACT" AND "LITTLE HATCH ACT" RESTRICTIONS ON PUBLIC EMPLOYEES THROUGH THE DISCIPLINE OF PUBLIC EMPLOYEE UNION OR ASSOCIATION OFFICERS AS A RESULT OF THEIR OFFICIAL CAPACITY ACTIONS IN EFFECTUATING THE POLITICAL CANDIDATE ENDORSEMENT AND SUPPORT OF THEIR UNION OR ASSOCIATION.

Employer imposed restrictions on the political activities of public employees raise significant constitutional issues. Such restrictions, commonly referred to as "Hatch Act" restrictions on federal employees and "Little Hatch Act" restrictions on state and local government employees, raise serious First Amendment concerns but have a solid constitutional foundation in *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO,* 413 U.S. 528 (1973) (upholding the constitutionality of the federal Hatch Act) and *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (upholding the constitutionality of the Oklahoma "Little Hatch Act").

In interpreting and applying public employer restrictions on civil service employees, "Hatch" restrictions are measured under a *Pickering v. Bd. of Educ.,* 391 U.S. 563 (1968), balancing approach which seeks to apply and interpret such restrictions so as to avoid a constitutional

question. Political endorsements of candidates, especially "indirect" endorsements made not by civil servants in their job related or personal capacity but rather in their off duty non-civil servants capacity as officers of an association or union of civil service employees, raise particularly sensitive problems. Magness, Comment: "Un-Hatching" Federal Employee Political Endorsements," 34 *Pa. L. Rev.* 1497 (1986). Many restrictions on partisan political activity by civil servants are justified by the government's interest in the fair and efficient administration of the law. *Letter Carriers*, 413 U.S. 528 (1973); *Broadrick*, 413 U.S. 601 (1973). Restrictions on supervisory mandates of political support under patronage systems violate basic First Amendment principals. *O'Hare Truck Serv. Inc. v. City of Northlake*, 518 U.S. 712 (1996); *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990); *Branti v. Finkel,* 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976). Restrictions on endorsements by associations or unions of civil servants are less necessary and can restrict the expression of civil servants of their appropriate political interests. Such restrictions can deny employee organizations their constitutionally protected place in debates and campaigns in which the outcome will often determine the most fundamental issues involving public employment. 34 *Pa.L.Rev* 1497 (1986). If a public employer, like a chief of police, can terminate civil servants, like police officers, on the basis of the endorsement and support of an association in which they hold office, the question becomes not how such a restriction balances against the interests of efficiency and lack of corruption in government, but rather, whether the authority of a managerial employee to terminate civil servants for their political endorsements itself supports the establishment of the kind of corrupt, patronage based system which civil service reform and Hatch Acts are intended to remedy.

The application of Hatch Act principles to the political endorsements of associations and unions carried out by their covered civil servant officers has been faced by three Circuit Courts of Appeals and must be faced by the Little Hatch Act systems in place in all fifty states. The Second and the Eleventh Circuits' decision on this important matters conflict both in approach and result with that of the Fifth Circuit in this case. In addition while little Hatch principals are in place in all fifty states, the state systems have not been applied or interpreted to support or authorize the termination of the civil servant union or association officials on the basis of their official capacity participation in the political endorsements and support of their union or association anywhere outside Louisiana.

A. In December 1988, the Second Circuit Court of Appeals ruled that Morris Biller, President of the United States Postal Workers Union, AFL-CIO, and Vincent Sombrotto, President of the National Association of Letter Carriers, AFL-CIO, could not be disciplined under the then effective federal Hatch Act, 5 U.S.C. § 7324(a)(2), by a 60 day suspension on the basis of their unions' expressed support of presidential candidate Walter Mondale against incumbent President Ronald Reagan and their encouragement of union members to vote for Mondale and to contribute to the unions' political action funds. The union officers had been suspended for 60 days based solely on articles and statements in the union publications in 1983 and 1984 endorsing Mondale and urging union members to contribute to the union's financial support of Mondale. The Second Circuit recognized that this Court first upheld the constitutionality of the federal Hatch Act shortly after its enactment. *United Public Workers of America v. Mitchell,* 339 U.S. 75 (1947), and that twenty-six years after *Mitchell*, the constitutionality of Hatch Act restrictions was challenged again in *United States Civil*

Service Commission v. National Association of Letter Carriers, AFL-CIO, 413 U.S. 528 (1973). This Court again validated the Hatch Act. In reviewing these precedents the Second Circuit wrote:

> Significantly, *Letter Carriers* relied on *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), in balancing the employee's interest, as a citizen, to comment on public matters and the "interest of the government, as an employer, in promoting" the efficient rendering of public service. *Pickering* rejected Justice Holmes' view, earlier expressed in *Mitchell* [and relied on by respondent Congemi and Judge Porteous in the district court in this case] that public employment is a privilege. Any suggestion that a public employee "may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as a citizen to comment on matters of public interest. . . proceeds on a premise that has been unequivocally rejected in numerous decisions of this Court. *Pickering*, 391 U.S. at 568".
>
> We discern from these Supreme Court precedents a framework for analyzing alleged Hatch Act violations that balances the government's interest in efficiency and intregity against the employee's rights of free speech and association. [*citations omitted, interdelineation added*].

Biller v. United States Merit System Protection Board, 863 F. 2d 1079, 1088 (2d Cir. 1988). After a review of the competing interest which was dictated by this Court's *Letter Carriers* and *Pickering* precedents, the Circuit Judge Cardamone wrote:

> Following *Mitchell* and *Letter Carriers* we have weighed petitioners' First Amendment rights to express publicly their opinions on political subjects and candidates against the government's interest in promoting the efficiency of public service. Congress' clearly expressed view that when the scales are evenly balanced, the Hatch Act should be construed in favor of the rights of free speech is dispositive. As a consequence, for both charges [endorsing Mondale in the newsletter and urging member contributions] we hold that absent a showing of concerted action with a partisan campaign or organization, petitioners' rights of free expression outweigh the asserted risk of inefficiecy or corrupt government administration. 863 F.2d at 1090.

After *Biller* within the Second Circuit a union's or association's expression of an endorsement for a political candidate and resulting union financial support would not be a valid basis for disciplining union or association officers under "Hatch Act" or "Little Hatch Rules."

B. A similar result would pertain in the Eleventh Circuit. *See Blaylock v. United States Merit Systems Protections Board,* 851 F.2d 1348 (1988) (in which the American Federation of Government Employees', AFL-CIO, ("AFGE") political endorsement and support of Mondale against Reagan expressed by published articles from Kenneth Blaylock, the President of AFGE, resulted in Hatch based discipline of Blaylock and in which the Eleventh Circuit overturned the discipline again on under the rubric that where a statute may read to protect it constitutionality from invalidation under *Pickering* it should be so read).

In 1993 the federal Hatch Act was amended, partially in light of *Biller* and *Blaylock*, to provide that federal employees now may, among other things, express opinions about candidates and issues, contribute money to political organizations, attend political fundraising functions and campain for or against candidates in partisan elections. Federal labor and other employee organizations, may, under the 1993 Amendments, make endorsements, receive and solicit political contributions. *See e.g.* 5 U.S.C. § 7321 et seq. and 5 C.F.R. Part 734; Koca, "Hatch Act - A Primer" at *www.fpmi.com/mgrsum/hatch_act.shtml.*

"Hatched" public employee union or association officers in the Second and Eleventh Circuit could not be disciplined under the Hatch Act restrictions for the political endorsements and support of candidates of their unions or associations under the rules outlined in *Biller* and *Blaylock* and the application of the *Pickering* standard and the standard rule of construction that statutes should be read so as to avoid a finding of unconstitutionality.

C. In addition to the conflict between the treatment of the application of Hatch Act principals so as to avoid a constitutional problem between the Fifth and the Second and Eleventh Circuits, it is clear that public employees on the "Little Hatch Acts" or regulations outside of Louisiana may serve as officers of associations and unions which make political endorsements and lend support to political candidates without subjecting themselves to termination, discipline or other violation of "Little Hatch" restrictions. *See* Public Service Research Foundation, "States' Rules on Civil Service Employees' Political Activities," *www.psrf.org/chart2.html* (which lists 36 states which place no restrictions on employee political activities other than personally running for office and nine states which include

additional restrictions; none but Louisiana restrict associational endorsements).

Perhaps the best example of the standard approach is Oklahoma. The Oklahoma "Little Hatch" system is the one held to be constitutional in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). In Oklahoma, regulated "classified" (covered civil servant) employees may not actively participants in partisan fund raising and may not campaign for a candidate in any way while on duty. The Oklahoma rules do prohibit the participation in prohibited activities "directly or "indirectly" as in the case under the Louisiana Hatch Act. However, the Oklahoma Public Employees Association and its Board of Directors, composed in large part of classified employees, has regularly endorsed and supported candidates over the past fifteen years without the slightest suggestion of anything improper or resulting discipline. *See, e.g.*, 75 Ok. Code Ch. 62 §§ 257.10-1-3 through 10-1-5, and the Oklahoma Ethics Commission web cite, *www.state.okla.us/~ethics*, Informal Opinion IO-99-006. The decisions of both the Oklahoma Commission on Ethics and the Oklahoma Little Hatch Act, at *www.onenet/oklegal*, reveal no case of discipline for associational political endorsements. The fact that classified employees covered by Oklahoma's little Hatch system may, and do regularly, make political endorsements and support candidates through their activities as members of associations of classified employees without fear of discipline was confirmed consistently to counsel for petitioners on August 9-10, 2000, by Kimberlee Williams, Chief Policy Attorney, State of Oklahoma Office of Personnel Management; Marilyn Hughes, Executive Director, Oklahoma State Ethics Commissions; Nancy Nunley, Oklahoma Attorney General's Officer; and Mark Bledsoe, Oklahoma Public Employees Association.

Not only are the activities for which the petitioners were disciplined under the Fifth Circuit's application of the Louisiana "Little Hatch Act" protected activities for classified employees in Oklahoma under the "Little Hatch Act" system authorized under *Broadrick*, but there exists no other reported case, finding, or administrative decision under any of the other existing "Little Hatch Act" systems in which the discipline of officers of an association or union of civil service, classified or other covered employees has been sustained on the basis of their effectuation of a political endorsement or political support of candidates by their association or union. The International Union of Police Associations, AFL-CIO ("I.U.P.A."), represents police officers in 34 states, the District of Columbia, Puerto Rico and the Virgin Islands, employer in over 500 law enforcement agencies. I.U.P.A. and its affiliates do endorse and support political candidates. Each one of those organizations is led by working police officers; prior to the Fifth Circuit's decision no where has one of the officers been disciplined on the basis of the political endorsements or support of the association or union. The widespread political activity of the million member American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME") is widely known and yet the same has been true in AFSCME's case.

If the petitioners in this case were covered by the federal Hatch Act or the Oklahoma Hatch Act, the two Hatch Act statutes which this Court has approved constitutionally, they could not have suffered the termination approved by the Fifth Circuit in this case. If they worked in jurisdictions within the Second or the Eleventh Circuits, they would have been protected by the analysis outlined in *Biller* and *Blaylock*.

This Court should grant *certiorari* in this case in order to ensure the law applicable to all American classified civil

servants to political participation under Hatch Act principals is consistently applied so as to avoid any constitutional infirmity within a system which at one time protects the rights of association and speech of pubic employees under *Pickering* while to the same time not diminishing the *Broadrick* and *Letter Carriers* protections against inefficiency, corruption and patronage based bossism. Such was the result in *Biller* and *Blaylock*; a different analysis with a different result was used by the Fifth Circuit in this case.

II. THE FIFTH CIRCUIT DECISION BELOW CONSTITUTES AN ERRONEOUS INTERPRETATION OF LAW.

The court below relying on *Letter Carriers*, 413 U.S. 548 (1972) and its own earlier precedent in *Wachsman v. City of Dallas*, 704 F.2d 160, 172 (5th Cir. 1983) ruled that:

> [A]cting as officers of their association and through it, the appellants caused a political contribution to, and an endorsement of, candidate Stagni's campaign to be made. Such activities, undertaken 'directly or indirectly" violate the plain language of Section 2504 [of Louisiana's Little Hatch Act]. ...Because Chief Congemi's enforcement of the Little Hatch Act's ban on "direct and indirect" political activity by these appellants [by means of terminating the appellants] was constitutional we do not reach other issues raised on appeal." [*interdelineation supplied*].

This ruling is in reality contrary to both *Wachsman* and the system of analysis and findings set forth in *Letter Carreirs*. The Fifth Circuit displayed on unusual lack of caution in going directly to the issue of the constitutionality of this application of Louisiana's statute without first endeavoring to

the look carefully at the acts involved in an effort to avoid the constitional question as did the Courts in *Biller* and *Blaylock*. The better practice would have yielded a better result.

Neither *Wachsman* nor *Letter Carriers* support the Fifth Circuit determination that a police chief who opposes the political endorsement of an association or union of his police officers may use the admonition of a "Little Hatch Act" that those employees should avoid "directly or indirectly" paying "a contribution to a political organization" or making "a political speech or public political statement on behalf of a candidate" as the basis to terminate the entire executive board of a police association which endorses a candidate for city council opposed by the police chief. This is particularly true where the executive board members played no public role in the endorsement and support, other than communicating it to the candidate in their official capacities and signing the association's donation check in their officer capacities.

A. The Fifth Circuit found *Wachsman v. City of Dallas*, 704 F. 2d 160 (5th Cir. 1987) to be controlling precedent for the proposition that the Louisiana Little Hatch Act can restrict the First Amendment rights of employee organizations even when the association does not make any public announcement of its political endorsement or contribution. However, this holding reflects a misapplication of *Wachsman* and actually conflicts with its holdings. *Wachsman* is distinguishable from this case in at least six ways.

First, *Wachsman*, decided in 1983, involved a question of whether a government can regulate speech in nonpartisan elections, an issue not present in the instant case. In the words of Judge Garwood, the issue in the case was "to what extent may a city regulate the political activities of its

employees when city elections are conducted on a 'nonpartisan' basis?" 704 F.2d 160, 161 (5th Cir. 1983).

Second, and perhaps most significantly, *Wachsman* expressly indicated that the conduct for which the officers were terminated here cannot be regulated by the government. The undisputed facts in *Wachsman* were that "an association or organization of city employees may mail or otherwise distribute endorsements of city council candidates to the city employee members of such organization or association." 704 F.2d at 163. Obviously, if an association can distribute endorsements of candidates to its members, it can make endorsements as long as it does not go out to a public rally under the authority of their public office and publicly announce the endorsement. In this case, the PACK executive board communicated the endorsement only to its members and to Mr. Stagni directly. No public announcement by PACK was made with regard to its endorsement.

Third, *Wachsman* accepted that "the City Charter does not prohibit the Committee, the Committee's members, or Wachsman from contributing to partisan candidates, or from publicly endorsing or actively supporting partisan candidates while **not on duty, in uniform, or in a City office or building.**" 704 F.2d at 163 (*emphasis added*). Thus, the holdings in *Wachsman* do not apply to the type of non-public endorsements made by PACK in this case. No dispute exists here that the PACK executive board effectuated PACK's endorsement of Stagni and contribution to him while off duty, out of uniform and not in a Kenner government office. The very context of this case places it outside of the legal holdings in *Wachsman*. *Wachsman* expressly contemplated that the conduct at issue here is permissible. That case concerned the next step of whether **public** announcements and outwardly vocal support of **nonpartisan**

candidates could be taken by an employee organization, even if only to small groups.

Fourth, the association in *Wachsman* was a political club – something which the Louisiana Little Hatch Act expressly intends to cover. The Committee was "the joint political arm of the Dallas Police Association and the Dallas Professional Firefighters' Association. . . The Committee was formed in 1978 to campaign for a pay increase referendum." 704 F.2d at 162, n.1. The Police Association existed separately from the Committee. In this case, PACK is not a political club. Its purpose is to represent the working interests of the Kenner Police Officers. The fact that it occasionally engages in political speech does not convert it to a political club.

Fifth, the Committee in *Wachsman*, unlike PACK here, did "not claim to have any greater constitutional rights to be free of the regulations in question than those rights which it asserts are possessed by and applicable to its city employee members." 704 F.2d at 163. PACK and its executive board, on the other hand, have consistently asserted that although the Little Hatch Act may constitutionally restrict the police officers' individual political speech rights, it cannot be so broad as to restrict the rights of a separate association which has its own First Amendment rights.

Finally, the language in *Wachsman* does not support the result reached here. *Wachsman* expressly stated that it was concerned about allowing an employee organization to make a public announcement of an endorsement at a political gathering. The Court's concern was that the announcement of a political endorsement at a public gathering by an official spokesperson for an organization would convert the gathering to a political gathering. It is the public announcement at a

political gathering which "carries with it all the pernicious possibilities inherent in allowing individual employees to so address political gatherings." 704 F.2d at 172. Relying almost exclusively on this language, the panel found that PACK's executive board could be terminated for PACK's non-public endorsement of, and contribution to, Candidate Stagni. Yet, the concerns of *Wachsman* – that an official spokesperson for the association would make a public pronouncement of the endorsement at a gathering thereby converting the gathering to a political gathering – simply do not exist in the facts at hand. No PACK executive board member ever publicly announced PACK's endorsement; no PACK executive board member ever made any public appearance as an official or unofficial spokesperson for PACK with regard to the election; no PACK executive board member ever addressed any gathering to announce PACK's endorsement.

In case there could be any remaining doubt that *Wachsman* only involved the public announcement of endorsements by the association itself, *Wachsman* added that the association's release of an endorsement through any news medium would invoke the same analysis as that applied to endorsements before political gatherings. "It is a formal public endorsement and therefore can be validly restricted." 704 F.2d at 173, n. 20 (emphasis added). Interestingly, the Fifth Circuit's decision in the instant case omitted this language from the quoted section of *Wachsman*. Yet this very language confirms that *Wachsman* only considered "formal public endorsements" as those which could be validly restricted. The type of non-public endorsement issued by PACK, communicated by PACK only to its own members and to the candidate himself, and communicated outside of the officers' police duty hours, out of uniform, and off of government property is not the type of speech *Wachsman*

could be validly restricted. The reliance on *Wachsman* as controlling precedent in this case was unfounded.

B. The Fifth Circuit's expansion of *Wachsman* to allow a police chief to fire an association's entire executive board because the association voted in a private meeting to endorse a candidate and communicated that endorsement only to its members and to the candidate himself unconstitutionally infringes on the First Amendment rights of associations. Such a broadening of *Wachsman* further impedes dozens, if not hundreds, of employee organizations that engage in political speech, and restricts associations in the Fifth Circuit to a degree unheard of in other Circuits throughout the Country.

The heart of this case revolves around the degree to which the clearly established First Amendment rights of association, petition, and political activity enjoyed by public employee associations and unions set forth in *Smith v. Arkansas State Highway Employees*, 441 U.S. 463 (1979), are subject to restriction under the *Pickering v. Board of Education*, 391 U.S. 563 (1968), balancing test applicable to "Little Hatch Acts" as outlined in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), and its companion case *U.S. Civil Service v. National Association of Letter Carriers AFL-CIO*, 413 U.S. 548 (1973).[1]

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1. This case does not raise the following settled issues:

(a) the constitutionality of the Louisiana "Little Hatch Act", §2504 itself;

(b) whether a distinction might exist between partisan and non-partisan activity;

(c) whether the statute's provision limits both

Seven years ago, the Fifth Circuit recognized that as early as "1987 it was clear that the First Amendment protects an employee's right to association with a union." *Boddie v. Columbia*, 989 F.2d 745 (5th Cir. 1993)(citations omitted); *see also Brady v. Fort Bend Co.*, 58 F.3d 173, 176 (5th Cir. 1995). Speaking almost directly to this case, the Fifth Circuit declared:

> The right to association encompasses the right of public employees to join unions and the right of their unions to engage in advocacy and to petition the government in their behalf. Thus, the First Amendment is violated by state action whose purpose is either to intimidate public employees from joining a union or from taking an active part in its affairs or to retaliate against those who do.

Boddie v. Columbia, 989 F.2d at 749 (5th Cir. 1993)(citing *PACE v. El Paso Co. Com. Col. Dist.*, 739 F.2d 258, 262 (5th Cir. 1984)). Yet, the decision here is directly contrary to these cases and undermines the Constitutional principles behind them.

Civil service employees' First Amendment Free Speech rights are limited by the "Little Hatch Act," in part, because their association remains free in its political speech and the officers remain free in their associational rights. *See*,

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by "collusion and indirection what they may not lawfully do directly and openly"; or

(d) whether the statute restricts membership in avowedly "political clubs or organizations" in which civil service employees act as "official spokesmen" for the organization in its public political activities.

Broadrick v. Oklahoma, 413 U.S. 601 (1973); and Magness, Comment: "Un-Hatching Federal Employees Political Endorsement," 134 *U. Pa. L. Rev.* 1497 (1986). The balancing done in *Broadrick* weighed the need to protect public employment from political coercion of the type evidenced by Chief Congemi here and to ensure that the general citizenry is not given the impression, for example, that individual police officers, as police officers, are supporting the election of one candidate over an other. These interests outweigh the need for active public political involvement by civil servants themselves; however, the interest of associations of civil servants which seek to take part in our political discourse in a manner in which individual members do not express political views publicly, are not outweighed by the protection afforded those principles under *Broadrick*. Magness, *34 Pa.L. Rev.* 1497 (1986). If Chief Congemi is allowed based on his own candidate preferences to terminate his subordinates for the political speech of their association, *Broadrick's* goal of protecting a proper functioning of free public discourse will be undermined, not advanced.

If La. R.S. § 2504's restriction on "indirect" political endorsement and support can be constitutionally expanded to require the termination of union officers for acting in private to perform their duties as union officers, then First Amendment association and petition rights of civil service associations and unions are limited far more radically by the "Little Hatch Acts" than they have ever been before. The panel's decision will radically alter the landscape of free political speech in the Fifth Circuit, while in other Circuits through out the Country, employees' rights to engage in political speech is aggressively protected. *See, e.g., DiRuzza v. County of Tehama*, 206 F.3d 1304,(9th Cir. 2000).

While Associations' rights to engage in public political activity implemented even through the private, off-duty, activity of its "hatched" civil service officers remain protected outside the Fifth Circuit, organizations within the Fifth Circuit as diverse as a local chapter of the NAACP, a state AFL-CIO, a local Criminal Justice Commission, a Federation of Teachers, a Kawanis club, a Christian Law Enforcement Officers Association, or a local National Organization of Women chapter which has civil servants on its executive board, as well as the hundreds of local unions from police to fire fighters to teachers to clerical staff, will be prohibited from engaging in political activities which, prior to the decision below, were protected First Amendment speech. In candidate Stagni's list of his supporters, he included the following: Alliance for Good Government, AFL-CIO, Jefferson Federation of Teachers, Jefferson Parish Councilman John Lavarine, Jefferson Independent Voter Association, Kenner Fire Fighter Association, Police Association City of Kenner, Kenner Councilman John Lavarine, III, Louisiana Criminal Justice Commission, Spanish American Business Association and Coach J.T. Curtis. These organizations and similar organizations throughout the Fifth Circuit who have civil servants on their executive board will be effectively prohibited from engaging in their First Amendment political expression in future elections if the Fifth Circuit's decision is law.

Conclusion

For the reasons stated above, the petition for *certiorari* should be granted.

Respectfully submitted,

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